SUPREME COURT, U. S.

FILED
DEC 20 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

NO. 857

DOROTHY K. NELSON, APPELLANT

vs.

RONALD KEITH MANLEY, a minor, by BLAINE MANLEY, his Guardian Ad Litem, APPELLEE

WAYNE L. SOSZKA, APPELLANT

vs.

JOSEPH NICK MANGANARO AND MARTHA A. ELIZABETH CANOUSE MANGANARO, APPELLEES

On Appeal from the Supreme Court of the State of Hawaii

JURISDICTIONAL STATEMENT

MORRIS P. SKINNER
Attorney for Appellant
1060 Bishop Street
Honolulu, Hawaii

LESLIE T. BENNETT
Attorney for Appellant
1060 Bishop Street
Honolulu, Hawaii

INDEX

	Page
Introductory Statement	1
Opinions Below	2
Jurisdiction	2
Statute Involved	4
Questions Presented	4
Statement	5
The Questions are Substantial	7
Conclusion	11
CASES:	
Cheseboro v. Los Angeles County Flood Control District, 306 U.S. 459	4
Hess v. Pawloski, 274 U.S. 352	4-7
Jamison v. Texas, 318 U.S. 413	4
Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306	9
Nashville C. and St. L. R. Co. v. Walters, 294 U.S. 405	4
Senn v. Tile Layers Protective Union, 301 U.S. 468	4
Wuchter v. Pizzutii, 276 U.S. 13	4-8

Page

STATUTES:

§ 230-33 Revised Laws of Hawaii, 1955, as amended ..... 4 App. A.

28 U.S. Code § 1257(2) 3

28 U.S. Code § 2101(c) 3

IN THE

Supreme Court of the United States

October Term, 1968

NO.

DOROTHY K. NELSON, APPELLANT

vs.

RONALD KEITH MANLEY, a minor, by BLAINE MANLEY, his Guardian Ad Litem, APPELLEE

WAYNE L. SOSZKA, APPELLANT

vs.

JOSEPH NICK MANGANARO AND MARTHA A. ELIZABETH CANOUSE MANGANARO, APPELLEES

On Appeal from the Supreme Court of the State of Hawaii

JURISDICTIONAL STATEMENT

INTRODUCTORY STATEMENT

The two cases noted above involved the same issue of law, namely the constitutionality of the Hawaii statute providing for service on a non-resident motorist by publication, and were consolidated for the purpose of appeal to the Supreme Court of the State of Hawaii. The decision

of that Supreme Court applied to both cases. However, in the case of Ronald Keith Manley, a minor, by Blaine Manley, his Guardian Ad Litem vs. Dorothy K. Nelson, the Appellant, Dorothy K. Nelson, elected not to appeal the final decision of the Supreme Court of Hawaii to the United States Supreme Court.

Therefore, the following is directed to the appeal of Wayne L. Soszka, Appellant vs. Joseph Nick Manganaro and Martha A. Elizabeth Canouse Manganaro, Appellees.

Appellant appeals from the final judgment of the Supreme Court of the State of Hawaii entered September 23, 1968 affirming the judgment and order of the Circuit Court of the First Judicial Circuit, State of Hawaii, (hereinafter called the First Circuit Court) denying Appellant's Motion to Quash Service of process on him on the grounds that the State statute under which such service of process was attempted was and is in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and the due process clause of the Constitution of the State of Hawaii, being Article 1 Section 4.

OPINIONS BELOW

The Opinion and Order of the First Circuit Court, State of Hawaii is not reported. The opinion of the Supreme Court of Hawaii is not as yet officially reported. The Order of the First Circuit Court and the Opinion and Judgment of the Supreme Court of the State of Hawaii are set forth in the Appendix B and C.

JURISDICTION

The Appellees filed their Complaint in the First Circuit Court seeking damages for bodily injuries from the Appellant as a result of a collision between the automobile operated by Joseph Nick Manganaro and the automobile operated by the Appellant. The collision occurred in the

State of Hawaii. At the time the action was filed the Appellant no longer resided in Hawaii. Service of Notice of the action on the Appellant by publication in a Honolulu, Hawaii newspaper was ordered by the First Circuit Court, pursuant to Section 230-33 Revised Laws of Hawaii 1955, as amended.

Appellant, through an attorney employed by his insurer, made a special appearance and moved to quash service on the Appellant on the grounds that the provisions of the aforementioned statute providing for service by publication were repugnant to the due process clauses of the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Hawaii.

The Appellant's Motion was denied and Appellant thereupon filed a permitted Interlocutory Appeal to the Supreme Court of the State of Hawaii. Thereafter, in a written opinion filed June 27, 1968 the Supreme Court of the State of Hawaii affirmed the order of the First Circuit Court denying Appellant's Motion to Quash Service, holding that Section 230-33 Revised Laws of Hawaii 1955, as amended, providing for service by publication, was and is constitutionally valid under said due process clauses. On July 18, 1968 Appellant timely filed a Petition for Rehearing which was denied and the Judgment affirming the order of the lower court was entered September 23, 1968.

Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of the State of Hawaii on October 15, 1968, by Appellant, Wayne L. Soszka, and Appellant's Motion to Stay Mandate was granted October 30, 1968.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of the State of Hawaii on appeal is conferred by Title 28, United States Code, Section 1257(2) and Section 2101(c). That such jurisdiction exists in the circumstances of this

case is sustained by the following decisions: **Hess v. Pawloski,** 274 U.S. 352, 71 L.ed 1091, 47 S.Ct 632; **Wuchter v. Pizzutti,** 276 U.S. 13, 72 L.ed 446, 48 S.Ct 259; **Jamison v. Texas,** 318 U.S. 413, 87 L.ed 869, 63 S.Ct 669; **Cheseboro v. Los Angeles County Flood Control District,** 306 U.S. 459, 83 L.ed 921, 59 S.Ct 622; **Senn v. Tile Layers Protective Union,** 301 U.S. 468, 81 L.ed 1229, 57 S.Ct 857; **Nashville C. and St. L. R. Co. v. Walters,** 294 U.S. 405, 79 L.ed 949, 55 S.Ct 486.

STATUTE INVOLVED

The statute involved in this matter is Section 230-33 Revised Laws of Hawaii, 1955 as amended by Act 86 of the 1965 Session of the Hawaii State Legislature. The full text of said Section is set forth in Appendix A. The amendment in issue is as follows:

> "After service on the director of regulatory agencies, or his deputy, if the defendant cannot be found in the State since he has removed himself from the State and he cannot be found to serve or mail the summons after due diligence and the facts shall appear by affidavit or otherwise to the satisfaction of the judge, he may order that service be made by publication of summons in some newspaper suitable for the advertisement of notice of judicial proceedings for such length of time as he may deem reasonable, not less than once each week in four successive weeks, the last publication to be not less than twenty-one days prior to the date set for the trial of the action. The service of summons shall be deemed complete at the expiration of the time prescribed by the order for publication. Such order and notice shall also set a date for the trial of the action."

QUESTIONS PRESENTED

1. Whether the amendment to Section 230-33 Revised Laws of Hawaii 1955, being Act 86 of the 1965 Hawaii State Legislature, providing for service on a non-resident

motorist by publication, is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the Supreme Court of the State of Hawaii erred in holding that said statutory provision is not repugnant to and does not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the Supreme Court of the State of Hawaii erred in affirming the order of the First Circuit Court, denying Appellant's Motion to Quash Service made by publication under the provisions of said statutory section providing for service upon a non-resident motorist by publication.

STATEMENT

One of the Appellees, Joseph Nick Manganaro, and the Appellant, Wayne L. Soszka, were both members of the Armed Services on active duty stationed in Hawaii on April 16, 1965, the date of the automobile accident which formed the basis of the civil action which was filed on June 13, 1966 in the First Circuit Court, State of Hawaii, by Joseph Nick Manganaro and Martha Elizabeth Canouse Manganaro, plaintiffs, vs. Wayne L. Soszka, defendant, being Civil No. 19365 in said Court.

At an unknown date prior to the filing of the Complaint the Appellant had left the State of Hawaii and was no longer a resident thereof.

According to the Affidavit of Appellees' attorney, a certified copy of the Complaint and Summons was served on the Director of Regulatory Agencies (the proper Hawaii State official under the provisions of Section 230-33 Revised Laws of Hawaii 1955 as amended) on June 27, 1966 since the defendant (Appellant) could not be found in the State of Hawaii; and on June 28 and September 26, 1966 certified letters with return receipt re-

quested and postage prepaid, were sent to the defendant's (Appellant's) last known addresses in the State of California in which were enclosed certified copies of the Complaint and Summons and Notice of Service of Summons by Delivery of certified copy to the Director of Regulatory Agencies; that both letters were returned with the respective notations "no such number" and "moved, left no address." No return receipt signed by the defendant was filed.

Upon the return of the certified letters addressed to the defendant (Appellant), Appellees then sought and obtained from the First Circuit Court of Hawaii an order for service on the defendant by publication under the provisions of the second paragraph of Section 230-33 Revised Laws of Hawaii 1955 as amended, being the amendment added by Act 86 of the 1965 Legislature of the State of Hawaii.

On the return date of the published notice to the defendant-Appellant he made a special appearance by an attorney employed by his insurer and moved to quash the service of process on the ground that the statute under which service of process on him was attempted was constitutionally invalid under the due process clause of the Fourteenth Amendment to the United States Constitution and the like clause in the Constitution of the State of Hawaii.

After considering memoranda filed by the parties and argument, the First Circuit Court denied the Motion to Quash Service.

A permitted Interlocutory Appeal was taken by Appellant to the Supreme Court of Hawaii.

The Appellant has contended at every stage of the proceedings that the second paragraph of Section 230-33 Revised Laws of Hawaii 1955, as amended, violates the Fourteenth Amendment to the Constitution of the United States in that it authorizes the service of process by publication on a non-resident in an in personam action; does not within its terms provide for a reasonable probability that the

defendant will receive actual notice and denies to such non-resident notice of the action against him. These constitutional objections were considered but rejected both by the trial court, and by the Supreme Court of the State of Hawaii.

THE QUESTIONS ARE SUBSTANTIAL

This Appeal presents important constitutional questions involving the right of a non-resident motorist to notice of and an opportunity to be heard in a personal injury action against him growing out of an automobile accident in which he was involved in the State of Hawaii. The decision of the Supreme Court of Hawaii upholding the validity of the second paragraph of Section 230-33 Revised Laws of Hawaii 1955 as amended, carries obvious and far reaching implications. While the precise point in issue, viz, service by publication under non-resident motorists statutes, has not been, but ought to be, settled by The Supreme Court of the United States, we believe that fundamental principals regarding the right to notice and an opportunity to be heard, which have received repeated application in the decisions of this Court, compel the conclusion that the portion of the statute in question is constitutionally invalid.

In **Hess v. Pawloski,** 274 U.S. 352, 71 L.ed 1091 (1927) the Massachusetts statute under constitutional attack as being in violation of the due process clause of the Fourteenth Amendment to the United States Constitution provided, in substance, that a non-resident motorist using the Massachusetts highways thereby appointed a named state official as his agent for service of process in an action against him growing out of his use of a motor vehicle on the highways of Massachusetts. The statute also provided that

> ". . . such service shall be sufficient service upon said non-resident; provided, that notice of such service and

a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's Affidavit of Compliance herewith are appended to the writ and entered with the declaration."

In the decision upholding the constitutionality of this Massachusetts statute, Mr. Justice Butler said in part, (274 U.S. at Page 356)

"In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the state where arises causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident is involved. **It required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes no hostile discrimination against non-residents, but tends to put them on the same footing as residents.** (Emphasis added)

The case of **Wuchter v. Pizzutti,** 276 U.S. 13, 72 L.ed 446 (1928), involved the validity, under the Fourteenth Amendment to the United States Constitution, of a statute of New Jersey providing for service of process on non-residents of the state in suits for injury caused by the negligent operation of automobiles on its highways. Mr. Chief Justice Taft said, in part: (Page 19)

"The question made in the present case is whether a statute, making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the Secretary will be communicated to

the non-resident defendant who is sued. Section 232 of the Laws of 1924 (the New Jersey statute under attack) makes no such requirement. . . . We think that a law with the effect of this one should make a reasonable provision for such probable communication. . . . The enforced acceptance of service of process on a state official by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise . . . it will be entirely possible for a person injured to sue any non-resident he chooses, and through service upon the state official obtain a default judgment against a non-resident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud (**Heinemann v. Pier,** 110 Wis. 185, 85 N.W. 646) or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law."

The New Jersey statute was held to be constitutionally invalid because it "does not make provision for communication to the proposed defendant, such as to create reasonable probability that he would be made aware of the bringing of the suit." (Page 26)

As Mr. Justice Jackson said, inter alia, in the case of **Mullane v. Central Hanover Bank and Trust Co.,** 339 U.S. 306, at Page 315:

"It would be idle to pretend that publication alone as prescribed here is a reliable means of acquainting interested parties of the fact that their rights are before the courts. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal

circulation the odds that the information will never reach him are large indeed."

We contend that the publication provisions of Section 230-33 Revised Laws of Hawaii 1955, as amended, do not create a reasonable probability that a non-resident motorist would be made aware that a lawsuit had been brought against him in the State of Hawaii.

The question presented in this Appeal has serious and far reaching implication of national importance. It affects the lives and fortunes of millions of interstate motorists. It would open a Pandora's Box of evil, fraud and mischief if state courts are permitted to recognize the existence of a right by a plaintiff in one state to obtain a default judgment against a defendant who resided in another state without the knowledge of the defendant and without giving him an opportunity to defend himself.

If the Supreme Court of Hawaii is correct in holding this statute not to be in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution, then the door swings wide to allow injustice and deprivation of property without due process of law. This would raise the spectre of multiple and increased litigation. The Courts of the other forty-nine states would be faced with the constitutional question of giving or not giving full faith and credit to such a judgment of a sister state against one of its citizens.

The publication provision of the Hawaii non-resident motorist statute appears to be singular and unprecedented, but if upheld would undoubtedly spread to the other forty-nine states and create a national problem of personal judgments against persons, who would be denied notice and an opportunity to defend themselves against such judgments.

Further, if the Supreme Court of Hawaii is correct in

its decision the cases of **Hess v. Pawloski** and **Wuchter v. Pizzutti,** supra, are meaningless. The correctness of such a view of the Constitution can be settled only by a decision of this Court.

CONCLUSION

For the reasons stated, the questions presented by this Appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

MORRIS P. SKINNER
301 Gasco Building
1060 Bishop Street
Honolulu, Hawaii 96813
Attorney for Appellant,
WAYNE L. SOSZKA.

SKINNER, BENNET & ORNELLES
(Of Counsel)